

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

JOSEPH R. ERNST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:11-cv-625
	)	
EXPERIAN INFORMATION SOLUTIONS,	)	
INC., et al.,	)	
	)	
Defendants.	)	

**DEFENDANT WELLS FARGO BANK, N.A.'S MEMORANDUM IN SUPPORT  
OF ITS MOTION FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES Defendant, Wachovia Mortgage, a division of Wells Fargo Bank, N.A., the correct name of this defendant being Wells Fargo Bank, N.A., successor to Wachovia Mortgage FSB ("Wells Fargo"), by counsel, and in support of its Motion for Leave to File a Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Partial Summary Judgment Motion"), states as follows:

1. In this action under the Fair Credit Reporting Act, Joseph R. Ernst ("Plaintiff"), filed a Motion for Partial Summary Judgment and a Memorandum in Support on January 20, 2012. (Dkt. 40-41).
2. Wells Fargo filed an Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Opposition") on February 4, 2012. (Dkt. No. 44.) Plaintiff filed his Reply Memorandum in Support of his Motion for Partial Summary Judgment ("Reply") on February 13, 2012. (Dkt. No. 51.)

3. In his Reply, Plaintiff attached portions of the Deposition of Kathleen Hill. (Reply, Ex. 1.) This deposition was conducted on February 9, 2012, after Wells Fargo had already filed its Opposition. Thus, Wells Fargo has had no opportunity to present this new material to the Court. The Plaintiff's selective use of this newly taken deposition necessitates a sur-reply from Wells Fargo. (Reply 2-3, 5, 7, 9, 12, 14.)

4. In addition, the Plaintiff cites to the report of his expert, Evan Hendricks, frequently in both his Memorandum in Support of Partial Summary Judgment and Reply. Wells Fargo was not required to file its expert disclosure and report until February 6, 2012, after its Memorandum in Opposition was due. Wells Fargo respectfully refers the Court to Exhibit 13 of its Memorandum (Declaration of Terry Frank), in which counsel for Wells Fargo notes that summary judgment is premature given that discovery is on-going. Wells Fargo should be permitted to respond to Plaintiff's Partial Motion for Summary Judgment New material cited in the Expert Disclosure and Report of Jean Noonan. (Dkt. 48).

5. Moreover, the Plaintiff deploys new arguments in accusing Wells Fargo of bad faith and violation of Rule 11 to which Wells Fargo is entitled to respond. (Reply 5, 8.)

6. "A court has the discretion to allow a sur-reply where a party brings forth new material or deploys new arguments in a reply brief." *United States ex rel. Carter v. Halliburton Co.*, Civil Action No. 1:11cv602, 2011 U.S. Dist. LEXIS 145236, at \*40 (E.D. Va. Dec. 12, 2011). The Plaintiff's selective citation to a newly taken deposition constitutes "new material" and its invocation of bad faith and Rule 11 constitute "new arguments." *Id.*; see also *United States ex rel. Herndon v. Appalachian Reg'l Cmty. Head Start, Inc.*, Case No. 2:07cv00003, 2009 U.S. Dist. LEXIS 7411, at \*8 n.2 (granting sur-reply to respond to newly raised argument).

7. As Plaintiff's Reply was filed late in the evening of February 13, Wells Fargo has not yet completed its proposed sur-reply. A copy of the sur-reply will be provided to the Court as soon as possible. This motion and memorandum simply seeks to alert the Court to the need for a sur-reply and seek leave for the filing thereof.

8. Wells Fargo has met and conferred with Plaintiff's counsel, who does not oppose this motion. Wells Fargo attaches as Exhibit A its proposed order on this Motion.

WHEREFORE, Wells Fargo, by counsel, requests that this Court enter the Proposed Order to be tendered granting leave to file a Sur-Reply in Opposition to Plaintiff's Motion for Partial Summary Judgment.

Respectfully submitted:  
February 15, 2012

**WELLS FARGO BANK, N.A.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 15, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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